No. 80-354

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In the Supreme Court of the United States

OCTOBER TERM, 1980

DRESSER INDUSTRIES, INC., PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Securities and Exchange Commission may obtain information pursuant to an administrative subpoena even though the recipient of the subpoena is also the subject of a federal grand jury investigation.

2. Whether a grand jury may obtain from the Securities and Exchange Commission information the Commission has gathered during its independent administrative investigation.

3. Whether the finding of the district court, affirmed by the court of appeals, that the Commission never agreed completely to forego its right to subpoena documents as part of its investigation, was clearly erroneous.

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OPINIONS BELOW

Neither the opinion of the en banc court of appeals (Pet. App. A) nor the prior opinion of the panel (Pet. App. B) is reported. The opinion of the district court (Pet. App. C) is reported at 453 F. Supp. 573.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1980. The petition for a writ of certiorari was filed on September 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

The statutes and rules involved appear in Pet. App. D and the appendix attached to this brief.

STATEMENT

In January 1976, petitioner Dresser Industries, Inc., a domestic corporation that also does business overseas, became a participant in a Securities and Exchange Commission program under which it agreed voluntarily to provide information concerning questionable foreign payments. In the fall of that year, the Department of Justice established a task force to investigate possible criminal violations by domestic corporations arising from such payments. In August 1977, at the request of the Department of Justice, the Commission made its files available to the task force attorneys. Those files contained documents concerning more than four hundred corporations, including petitioner.

In January 1978, a grand jury sitting in the District of Columbia commenced an investigation into petitioner's overseas payments and issued a subpoena to petitioner for production of documents. In April 1978, the Commission independently determined to commence an investigation into the adequacy of petitioner's disclosure of these

payments in accordance with the requirements of the federal securities laws, and it issued an administrative subpoena to petitioner covering some of the same documents.[1]

When petitioner failed to respond to the Commission's subpoena, the Commission applied to the United States District Court for the District of Columbia for enforcement. Petitioner opposed enforcement of the subpoena, contending, *inter alia,* that the Commission's subpoena exceeded its authority, that the Commission had breached prior commitments concerning the confidentiality of the materials involved, and that simultaneous Commission and grand jury investigations were improper. The district court rejected these contentions and enforced the subpoena. *SEC* v. *Dresser Industries, Inc.,* 453 F. Supp. 573 (D.D.C. 1978) (Pet. App. C).

On appeal, a panel of the court of appeals unanimously affirmed the district court's order enforcing the Commission's subpoena. However, with one judge dissenting from that part of the opinion, the panel *sua sponte* modified the district court's order and prohibited the Commission "from making available to the Justice Department attorneys conducting the grand jury proceedings the fruits of the Commission's discovery pursuant to the subpoena" (Pet. App. B-28 to B-29).

On petition by the Commission, joined by the United States as intervenor, the court of appeals vacated the panel opinion and granted rehearing en banc (Pet. App. A-3). By unanimous vote, the en banc court affirmed the

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[1] The Securities and Exchange Commission has not yet completed its investigation and has made no formal reference of this case to the Department of Justice.

district court order enforcing the subpoena and rejected the modification imposed by the panel majority (Pet. App. A-34). Noting that "there is no support for the panel's modification in either the relevant statutes or legislative history" (Pet. App. A-35), the court held that, after the Commission begins a lawful investigation, it may "transmit such evidence as may be available concerning * * * [violations] * * * to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings" (*id.* at A-15 to A-16, quoting 15 U.S.C. 78u(d)). The court also held that the Commission, after turning over such materials, may continue to "make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision" of the federal securities law (Pet. App. A-15 to A-16, quoting 15 U.S.C. 78u(a)). The court concluded that the Commission's exercise of its authority did not infringe the secrecy of the grand jury's proceedings (Pet. App. A-30 to A-32); rather, it helped to insure that the grand jury would receive all relevant evidence (*id.* at A-39 to A-40). The court also rejected the contention that the policy considerations pertaining to the statutory summons authority of the Internal Revenue Service found controlling in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), were relevant here, since "the SEC's authority to issue the subpoena remains undiminished after the start of a grand jury investigation" (Pet. App. A-23 to A-25).

ARGUMENT

The court of appeals, sitting en banc, unanimously held that it was proper for the Commission to furnish, and the grand jury to receive through the Department of Justice, relevant information that the Commission has gathered in its independent civil investigation. The decision of the court of appeals is consistent with principles previously

endorsed by this Court and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. This Court repeatedly has recognized that an administrative agency may conduct investigations into conduct that also is being examined by a grand jury. It also has recognized that the fruits of such investigations may be provided to the Department of Justice when the agency investigation is not employed solely as a device for gathering evidence for a criminal prosecution. *United States* v. *Kordel*, 397 U.S. 1, 11-12 (1970); *Standard Sanitary Mfg. Co.* v. *United States*, 226 U.S. 20, 51-52 (1912).

There is no merit to petitioner's contention (Pet. 7-10), that application of these principles in this case is inconsistent with *United States* v. *LaSalle National Bank*, *supra*, or *Donaldson* v. *United States*, 400 U.S. 517 (1971). To the contrary, both of those decisions support the reasoning of the court below. In *LaSalle National Bank*, this Court reversed a decision of the court of appeals that had refused to enforce an IRS summons because the motivation of the individual agent conducting the case was to gather evidence for a prospective recommendation for criminal prosecution. This Court held that the prophylactic rule of *Donaldson* (preventing use of an IRS summons following an IRS recommendation for criminal enforcement) should apply only after the IRS has determined institutionally to recommend criminal prosecution. The decision in *LaSalle* did not rest on constitutional considerations; the case involved only the construction of IRS statutes.

The limited powers of the IRS after referring a case to the Department of Justice stand in sharp contrast to the powers of the Securities and Exchange Commission to pursue its own investigation and seek appropriate civil relief. Institution of criminal tax proceedings shifts from the IRS to the Department of Justice control over future compromises of civil tax liability. *United States* v. *LaSalle National Bank, supra,* 437 U.S. at 312. By contrast, the pendency of criminal charges or the existence of a grand jury investigation does not limit the Commission's control over its independent proceedings for civil administrative or judicial relief. Thus, the Commission retains authority to investigate and seek a civil remedy regardless of what the Department of Justice decides to do with respect to a possible criminal reference. See Pet. App. A-11 to A-34. So long as the Commission is seeking evidence to fulfill its own statutory responsibilities, there is no abuse of its administrative process. 437 U.S. at 311-316.

For similar reasons, petitioner's reliance on *Donaldson* v. *United States, supra,* also is unavailing. In *Donaldson,* this Court recognized that information gathered by the IRS with a summons issued under 26 U.S.C. 7602 could be used in a criminal prosecution. The Court noted that "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct" (400 U.S. at 535), and it pointed out that during the pre-referral stages of an investigation, the IRS may utilize its summons power as long as the summons is "issued in good faith and prior to a recommendation for criminal prosecution" (*id.* at 536). The Court also indicated that an IRS summons is not properly employed following a "recommendation for criminal prosecution" (*ibid.*), but that determination rested on the assumption of complete

responsibility for the case in both its criminal and civil aspects by the Department of Justice. By contrast, there is no comparable relinquishment of the Commission's authority over the civil aspects of a case when the grand jury begins its investigation (Pet. App. A-18 to A-34).[2]

The Commission's authority to conduct such investigations and to seek enforcement of its subpoena in federal court is explicit,[3] as is its authority to institute civil proceedings to enforce the federal securities laws. In addition, the Commission may transmit "such evidence as may be available" to the Attorney General for use in criminal investigations. See Section 20(b) of the Securities Act of 1933, 15 U.S.C. 77t(b); Section 21(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(d). The statutes impose no limits on the transmittal of information; nor do they specify a temporal or functional cut-off point.[4]

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[2]This Court granted certiorari in both *Donaldson* and *LaSalle* because of a continuing disagreement among the circuits as to the enforcement responsibilities of the IRS. See 400 U.S. at 522; 437 U.S. at 305. By contrast, no court of appeals has adopted a position at variance with that of the D.C. Circuit in this case. Petitioner's claim (Pet. 6) that the decision of the court of appeals may apply in other statutory contexts is not a basis for granting review. The opinion below rested on the court's careful analysis of the statutory scheme that is relevant in this case. Whether the court's reasoning would apply under other statutes will depend on the nature of the investigatory authority that those statutes confer.

[3]See Sections 19(b), 20(a), and 22(b) of the Securities Act of 1933, 15 U.S.C. 77s(b), 77t(a), and 77v(b). See also Section 21(a)-(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a)-(c). The agency's powers of investigation are comparable to those of a grand jury that may investigate on the basis of suspicion that the law has been violated. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643, 652 (1950).

[4]Close cooperation between the Department of Justice and the Securities and Exchange Commission is also central to the Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, which provides criminal penalties for bribery of foreign officials by

2. Petitioner also argues (Pet. 12-14) that the decision below improperly expands the scope of information presented to the grand jury and permits the prosecutor to "infringe" on its functions.

This line of argument ignores the established legal principle that the "grand jury's sources of information are widely drawn." *United States* v. *Calandra,* 414 U.S. 338, 344 (1974). The grand jury may consider evidence from all sources, including any evidence transmitted to the Department of Justice by the Commission. See *Branzburg* v. *Hayes,* 408 U.S. 665, 670 (1972):

> A grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." * * * Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors.

Of course, the Department of Justice attorney who presents evidence to the grand jury is the prime mover of the inquest. See, *e.g., Bacon* v. *United States,* 449 F. 2d 933, 943 (9th Cir. 1971).[5] Transmittal of relevant evidence

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United States corporations. Congress specifically contemplated a "close working relationship between the Justice Department and the SEC" in investigating questionable foreign payments. See H.R. Rep. No. 95-640, 95th Cong., 1st Sess. 10 (1977); S. Rep. No. 95-114, 95th Cong., 1st Sess. 11-12 (1977). Congress believed that the Commission's expertise would be of substantial assistance to the Department of Justice in pursuing such cases. H.R. Rep. No. 95-640, *supra,* at 9; S. Rep. No. 95-114, *supra,* at 11; see also *United States* v. *Fields,* 592 F. 2d 638, 646 (2d Cir.), cert. denied, 442 U.S. 917 (1979). The court of appeals' application of the rule in *United States* v. *Kordel, supra,* is essential in serving this important statutory purpose.

[5]Petitioner's reliance (Pet. 13) on *In re Melvin,* 546 F. 2d 1 (1st Cir. 1976), is misplaced completely. That case reversed a district court order to a suspect requiring him to appear in a line-up when no grand

to the Department of Justice for presentation to the grand jury plainly assists, rather than undermines, the grand jury's function. Nor can this process be conceived as an expansion of the grand jury's purview. As the court of appeals correctly observed (Pet. App. A-26), the grand jury's own investigative powers are at least as broad as those of the Commission.[6]

3. Petitioner also claims (Pet. 14-17) that the Commission lacks the authority to commence a civil enforcement proceeding in the face of a parallel grand jury investigation. When considered in light of the principles discussed above, petitioner's claim is frivolous.

Moreover, the Commission's authority to investigate possible civil and criminal violations of the federal securities laws, and to seek enforcement of its subpoenas, is independent of its authority thereafter to commence an action in federal district court to enjoin further violations

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jury subpoena had been issued. The court of appeals concluded that the order was not in aid of the grand jury and had no legal basis. In contrast, the subpoena of the Commission in this case rested on explicit statutory authority, and the transmittal of information from the Commission to the Department of Justice was a matter of cooperative law enforcement. It was not, as petitioner suggests (Pet. 12), "coercive discovery" directed against another agency.

[6]In *LaSalle,* this Court remarked that an IRS summons should not be used to "broaden the Justice Department's right of criminal litigation discovery." 437 U.S. at 312. We do not understand this reference to mean, however, that transmittal of relevant information to the grand jury by the prosecutor in cooperation with another law enforcement agency is in derogation of post-indictment discovery procedures. Prior to indictment, the grand jury exercises broad powers of inquisition. *United States* v. *Calandra, supra.* The rules of criminal discovery (and their attendant restrictions) do not come into play until charges are returned by indictment or information. *Post* v. *United States,* 161 U.S. 583, 587 (1896); *Kirby* v. *Illinois,* 406 U.S. 682, 688-690 (1972); Fed. R. Crim. P. 16.

of law or take other remedial action.[7] Until the Commission receives and considers all available evidence pursuant to that fact-finding process, no decision is ordinarily made regarding what, if any, administrative or civil enforcement action will be taken.

Should the Commission decide to initiate an enforcement action in the future, there is no ground for doubting its authority. The Commission's authority to conduct civil litigation on its own behalf in federal court has been upheld since its formation. See *SEC* v. *Robert Collier & Co.*, 76 F. 2d 939 (2d Cir. 1935); *Jones* v. *Kennedy*, 121 F. 2d 40, 45 (D.C. Cir.), cert. denied, 314 U.S. 665 (1941). See also *SEC* v. *Chenery Corp.*, 332 U.S. 194, 209 (1947).

Nor are petitioner's arguments advanced by *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976), which held that law enforcement powers could not be vested in the Federal Elections Commission, a government body whose appointees were selected and controlled by Congress. The Securities and Exchange Commission, in contrast, is an independent administrative agency whose members are appointed by the President with the advice and consent of the Senate, in conformity with Article II of the Constitution. See 15 U.S.C. 78d. The fact that the Commission, but for appointments, remains generally independent of the Executive Branch does not diminish its authority. See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 132-136; *Humphrey's Executor* v. *United States*, 295 U.S. 602, 628 (1935).

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[7]Compare Sections 19(a), (b), and 20(c) of the Securities Act of 1933, 15 U.S.C. 77s(a), (b), and 77t(c), and Section 21(a)-(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a)-(c), with Section 20(b) of the Securities Act of 1933, 15 U.S.C. 77t(b), and Section 21(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(b).

4. Petitioner further contends (Pet. 17-18) that the court of appeals' decision permits "unregulated sharing of grand jury investigatory information between the Justice Department and the SEC for the purpose of furthering the SEC's civil investigation." This, petitioner asserts, constitutes an "unprecedented breach of grand jury secrecy" in violation of Fed. R. Crim. P. 6(e).

Petitioner's contention has no bearing on the issues in the present case. The issues here are, first, whether the Commission is entitled to enforcement of its subpoena and, second, whether the Commission should be barred from transmitting to the Department of Justice any materials so received.[8] No evidence exists that the Commission sought disclosure of any information from the grand jury nor does the opinion below suggest that it could do so other than as provided by law.[9]

The cases cited (Pet. 19) by petitioner (*In re Perlin*, 589 F. 2d 260 (7th Cir. 1978), and *United States* v. *Dondich*, 460 F. Supp. 849 (N.D. Cal. 1978)) concern participation by agency representatives before the grand jury or

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[8]As to the latter proposition, it is obvious that the transmission of materials from the Commission to the Department for possible use by the grand jury could not possibly constitute a disclosure of "matters occurring before the grand jury" in violation of Fed. R. Crim. P. 6(e), since the transmission would precede any grand jury proceedings relating to the documents transmitted. And as to the former, it is similarly difficult to see how the production of documents by petitioner to the Commission has the slightest relationship to the secrecy of proceedings before the grand jury.

[9]The Commission's subpoena did not require disclosure of the nature of the materials that are before the grand jury. The subpoena requested certain categories of documents directly from petitioner, without regard to whether they have been requested by the grand jury (Pet. App. A-30). Petitioner itself chose to identify the documents that were sought by the Commission as encompassing those submitted to the grand jury (Pet. 3).

disclosure of matters occurring before the grand jury to an agency. As the instant case is wholly concerned with the flow of information from petitioner to the Commission, and then perhaps to the grand jury, petitioner's arguments and authorities are wholly inapposite.

5. Finally, petitioner argues (Pet. 21-23) that the Commission has failed to honor an agreement to examine petitioner's documents without first making copies or taking notes identifying individual persons or countries described in the documents.

However, petitioner has not challenged the factual finding of the district court, upheld by the court of appeals, that the Commission never agreed to forego completely its right to subpoena the materials in question (see Pet. App. C-2). Moreover, it was petitioner, not the Commission, who breached the agreement, since petitioner refused to provide access to unexpurgated copies of its documents (Pet. App. F-5 to F-6). These circumstances caused the Commission to commence a formal investigation and to utilize compulsory process. Neither petitioner's compliance with the grand jury's subpoena, nor its past willingness to volunteer certain limited information to the Commission, immunize it from further lawful investigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Section 19(b) of the Securities Act of 1933, 15 U.S.C. 77s(b), provides:

> For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this subchapter, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

Section 20(a) of the Securities Act of 1933, 15 U.S.C. 77t(a), provides:

> Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

Section 22(b) of the Securities Act of 1933, 15 U.S.C. 77v(b), provides:

> In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person

guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Section 21(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(c), provides:

In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor

and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

Section 4 of the Securities Exchange Act of 1934, 15 U.S.C. 78d, provides:

> (a) There is hereby established a Securities and Exchange Commission (hereinafter referred to as the "Commission") to be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate. Not more than three of such commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable. No commissioner shall engage in any other business, vocation, or employment than that of serving as commissioner, nor shall any commissioner participate, directly or indirectly, in any stock-market operations or transactions of a character subject to regulation by the Commission pursuant to this chapter. Each commissioner shall hold office for a term of five years and until his successor is appointed and has qualified, except that he shall not so continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office, and except (1) any commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and (2) the terms of office of the commissioners first taking office after June 6, 1934, shall expire as designated by the President at the time of nomination, one at the end of one year,

one at the end of two years, one at the end of three years, one at the end of four years, and one at the end of five years, after June 6, 1934.

(b) The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and other experts as may be necessary for carrying out its functions under this chapter, and the Commission may, subject to the civil-service laws, appoint such other officers and employees as are necessary in the execution of its functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.